

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARILYN BLAIR

Claimant

VS.

KERRY SWEET INGREDIENTS

Respondent

AND

LIBERTY INSURANCE CORP.

Insurance Carrier

Docket No. **1,032,787**

ORDER

Claimant requested review of the September 11, 2009 Award by Administrative Law Judge Steven J. Howard. The Board heard oral argument on December 8, 2009.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for the claimant. Stephanie Warmund of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Award contained an error in the calculation of the payment rate for temporary total disability compensation. The parties agreed that the temporary total disability compensation rate should have been based upon the average weekly wage without including the fringe benefits because all of the temporary total disability compensation was paid before claimant's employment was terminated.¹

ISSUES

It was undisputed claimant suffered an accidental injury to her left ankle as a result of a slip and fall at work. Claimant argued that as a result of an antalgic gait due to her

¹ See K.S.A. 2006 Supp. 44-511(a)(2).

ankle injury she developed hip and back pain. Consequently, claimant further argued that she was entitled to a K.S.A. 44-510e permanent partial disability based upon a work disability. Conversely, respondent argued that claimant was limited to a K.S.A. 44-510d scheduled disability as she did not meet her burden of proof to establish injury to her hip and back.

The Administrative Law Judge (ALJ) limited claimant to an 18 percent permanent partial K.S.A. 44-510d scheduled disability to her left lower leg.

Claimant requests review of the nature and extent of disability. She argues that she suffered permanent impairment to her hip and back due to her antalgic gait and is entitled to a work disability (a K.S.A. 44-510e permanent partial general disability greater than the functional impairment rating).

Respondent argues the claimant failed to meet her burden of proof that she suffered impairment to her hip or back due to her alleged antalgic gait and the ALJ's Award should be affirmed.

The sole issue for Board determination is the nature and extent of disability, specifically, whether claimant is entitled to a permanent partial disability for a K.S.A. 44-510d scheduled disability or a K.S.A. 44-510e work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings in this order. Therefore, the Board adopts the ALJ's findings as its own as if specifically set forth herein.

Briefly stated, claimant injured her left ankle on August 8, 2005, when she slipped on a wet floor. She received treatment and ultimately Dr. Stanley Bowling performed an arthroscopic partial synovectomy of her left ankle on December 13, 2005. Claimant continued to experience pain in her left ankle and she was later referred to Dr. Greg Horton. Dr. Horton recommended a surgical fusion of her ankle but the surgery was never performed and she was released at maximum medical improvement on December 15, 2007.

The claimant testified that over the course of her treatment she developed pain not only in her left ankle but also in her hip and back from walking with an altered gait. And she further indicated that from the date of her accident she used braces, walkers and

crutches to ambulate. Claimant further testified that beginning three months after her ankle injury she told Drs. Bowling, Badwey and Horton that she was experiencing pain in her hip and back. Her employment with respondent was terminated on March 20, 2007.

The ALJ limited claimant to compensation for a scheduled injury. Claimant notes the dispositive issue is whether she is entitled to compensation for a work disability because she suffered injury to her left hip and back from an antalgic gait caused by her left ankle injury.

It is significant to note that surveillance video was taken of claimant on October 12, 2006, and January 9, 2007. That video depicted claimant slightly limping while barefoot on October 12, 2006, but that same day she did not limp as she walked at various locations. By January 9, 2007, claimant was again shown walking without any evidence of an altered gait.

The medical records from the treating physicians do not mention that claimant complained of hip or back pain. Dr. Bowling testified that more likely than not if claimant had voiced such complaints they would have been noted in his records. Likewise Dr. Horton testified that it was his usual practice to record all complaints. And claimant's supervisor, Jeffrey Struve testified that as claimant continued working modified duty after her accident she never complained of hip or back pain.

The primary treating physician, Dr. Bowling agreed that it was possible to develop hip or back problems from an antalgic gait but he noted that if claimant developed such problems they most likely would be on the side opposite from her injured left ankle. Dr. Prostin, the court-ordered independent medical examiner, also noted that there were no hip or back complaints in the medical records until approximately three years after the accident. Dr. Prostin further agreed that if claimant's hip pain was due to an antalgic gait it would more likely be on the opposite side from her injured ankle. Moreover, Dr. Prostin could not state with any medical certainty that claimant's bursitis was related to her ankle injury.

Conversely, Dr. Michael J. Poppa, claimant's medical expert, opined that claimant suffered permanent impairment to her hip and back as a result of her antalgic gait. Dr. Poppa agreed that the medical records from the treating physicians did not note any hip or back complaints.

The ALJ analyzed the evidence and concluded that the surveillance video refuted claimant's contention that she walked with a limp and the preponderance of the medical evidence refuted her contention that she suffered any permanent impairment to her back or hip due to the ankle injury.

In summary, the evidence indicated that claimant suffered an ankle injury that initially caused her to limp but the surveillance video refuted her contention that she

continued to limp. The medical records do not contain hip or back complaints even though she testified that she told the treating doctors about her hip and back complaints. The hip and back complaints first appear when claimant was examined by her medical expert. Claimant's hip complaints were on the same side as her ankle injury and Drs. Bowling and Prostic testified that such complaints would have been on the opposite side if caused by an antalgic gait from her left ankle. And the court ordered independent medical examiner did not find any permanent impairment in claimant's back and could not state that her hip condition was caused by her ankle injury. The Board finds claimant failed to meet her burden of proof that she suffered permanent impairment to her hip or back. Consequently, she is limited to compensation for a K.S.A. 44-510d scheduled disability.

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Dr. Prostic opined claimant suffered a 20 percent impairment to her left lower extremity. It should be noted that Dr. Prostic's report indicated his rating was 20 percent for the lower extremity and 7 percent for the hip for a total of 21 percent. When questioned regarding that rating his explanation was confusing with the ultimate explanation that his combined rating for the hip and ankle was 26 percent. Dr. Horton opined claimant suffered an 18 percent impairment to her left lower extremity. Dr. Poppa opined claimant suffered a 40 percent impairment to her left lower extremity. The ALJ adopted Dr. Horton's rating as the most persuasive, the Board agrees and affirms.

As previously noted, the parties agreed that the Award used an incorrect temporary total disability compensation rate. The parties stipulated that claimant's average weekly wage was \$581.33 inclusive of fringe benefits. The fringe benefits were valued at \$144.33 per week. The parties further agreed that the weeks of temporary total disability compensation were all paid before claimant's employment was terminated. Consequently, the temporary total disability compensation rate should have been based upon claimant's average weekly wage before addition of her fringe benefits. The average weekly wage before addition of the fringe benefits calculates to \$437 which results in a \$291.35 temporary total disability compensation rate. The ALJ's Award will be modified accordingly.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Steven J. Howard dated September 11, 2009, is modified to correct the temporary total disability compensation rate and affirmed in all other respects.

Claimant is entitled to 44.94 weeks of temporary total disability compensation at the rate of \$291.35 per week or \$13,093.26 followed by 26.11 weeks at \$387.57 per week or \$10,119.45 for an 18 percent permanent partial scheduled disability making a total award of \$23,212.71, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 26th day of February 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge